

Honorable Philip H. Brandt
Hearing Date: September 30, 2009
Hearing Time: 9:30 a.m
Response Date: September 23, 2009
Location: Tacoma
Chapter 7

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re

No. 08-44234

HEATHER VAN GALDER,

REPLY TO DEBTOR'S RESPONSE TO
MOTION FOR SALE OF PROPERTY
FREE AND CLEAR OF LIENS

Debtor.

I. REPLY TO FACTS

The debtor filed a Chapter 7 Bankruptcy Petition on August 27, 2008. Prior to that time, and specifically on April 14, 2005, the debtor executed a Promissory Note and Deed of Trust in the amount of \$367,000.00 in favor of Harbourton Mortgage Investment Corporation pertaining to the real property located at 1522 N Cascade Ave, Tacoma, WA. On October 6, 2008, LaSalle Bank NA, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities LLC, Asset-Backed Certificates, Series 2005-HE9, its assignees and/or successors, by EMC Mortgage Corporation filed a Motion for Relief from Stay. The Trustee objected to the Motion for a variety of reasons, including the fact that the supporting declaration was not of a records custodian, but rather a "bankruptcy processor" that was only "familiar with" record keeping procedures; that there was no evidence of any subsequent assignment of the Promissory Note and Deed of Trust, or the servicing of the same; that a "blue ink" copy of the note had not been produced; and that there was no verification of the balance due, which was more than the amount of the Deed of Trust originally issued. A copy of the Trustee's response is attached hereto as

**REPLY TO DEBTOR'S RESPONSE TO MOTION FOR
SALE OF PROPERTY FREE AND CLEAR OF LIENS - 1**

KATHRYN A. ELLIS, ESQ.
600 Stewart St
Suite 620
Seattle, WA 98101
(206) 682-5002

1 Exhibit 1.

2 On November 4, 2008, LaSalle Bank continued the Motion for Relief from Stay to
3 December 9, 2008 and subsequently continued the matter again to January 6, 2009. Finally, on
4 January 6, 2009, the Motion was withdrawn as the moving party was unable to produce a “blue
5 ink” copy of the alleged note to support its position. To date, the requested copy of the note has
6 not been produced. For the reasons set forth in *In re Jacobson*, 2009 Bankr. LEXIS 709, (Bankr.
7 W.D. Wash. Mar. 10, 2009), LaSalle Bank has neither shown that it has standing to enforce any
8 alleged obligation, nor that it is the real party in interest. Most significantly, no Promissory Note
9 has been produced to support any secured claim of LaSalle Bank or its alleged assignor against
10 the property.
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13 11 U.S.C. § 363 (f)(5) here permits a sale free and clear of liens, with the liens attaching
14 to the proceeds, notwithstanding the fact that those proceeds may be insufficient to pay all liens,
15 assuming the same exist. *In re Jolan Inc.*, 403 BR 866, 870 (Bankr. W.D. WA 2009).

16 The sale of the property by the Trustee will require a tax return to be filed by the estate
17 reporting the sale of the property based on the property’s basis. The taxable basis in the property
18 will determine whether any capital gain is incurred and, if so, will be paid by the estate.
19

20 Finally, the debtor has no claim of exemption in a “short sale”. The Trustee is not
21 required to pay an exemption that is non-existent. Indeed, the debtor acknowledged in her
22 Statement of Intention that there was no equity in the property, that it would be surrendered, and
23 can hardly claim in good faith that any equity or exemption exists in a “short sale” as here.
24 Attached hereto as Exhibit 2 is a copy of the debtor’s Chapter 7 Statement of Intention.
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II. SUMMARY

For the reasons set forth above, the Trustee's motion to approve the sale of the property located at 1522 N Cascade Ave, Tacoma, WA should be approved and the debtor's claim of exemption in non-existent equity denied.

DATED this 23rd day of September, 2009.

/s/ Kathryn A. Ellis
Kathryn A. Ellis, Trustee

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